UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARTHUR CARDOZA, Plaintiff, v. JO ANNE B. BARNHART, Commissioner of Social Security Administration, Defendant.	Case No. CV 06-418-PJW MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

Plaintiff Arthur Cardoza brings this action seeking reversal of the decision of Defendant Social Security Administration ("the Agency"), denying his claim for Supplemental Security Income ("SSI") benefits. Alternatively, he asks the Court to remand the case to the Agency for further proceedings. For the following reasons, the Court concludes that the Agency erred and remand is required.

II.

STATEMENT OF FACTS

Plaintiff was born on November 6, 1954, and was 51 years old at the time of the administrative hearing. (Administrative Record ("AR") 52, 135.) He completed one year of college and can communicate in English. (AR 66, 134-43.) He has no past relevant work. (AR 142-43.)

Plaintiff applied for SSI on April 30, 2004, alleging disability since November 20, 2002. (AR 52-55.) In a report he submitted to the Agency, Plaintiff stated that torn cartilage in his right knee limited his ability to work. (AR 62.) After the Agency denied Plaintiff's claim, he timely requested a hearing before an administrative law judge ("ALJ"). (AR 22-23, 29, 34.)

The ALJ held a hearing on November 7, 2005. (AR 126-53.) Plaintiff appeared without counsel and testified. (AR 128.) Plaintiff's testimony centered around his right knee injury. He testified that he could only walk for short distances without a cane, and that he could not sit for longer than 15 minutes before standing because of pain in his right leg. (AR 139-43.) He also complained that he could not stand for more than 10 minutes because any weight on his right leg caused pain. (AR 141-42.) Plaintiff explained that he needed surgery on his knee but that he had had difficulty getting an appointment to see a doctor for surgery. (AR 135, 138.) Plaintiff stated, however, that he had arranged for surgery, which would take place after the hearing. (AR 137-38.)

The ALJ also heard testimony from a vocational expert. The ALJ posed the following hypothetical question to her:

> [A]ssume that you're dealing with an individual of the same age, education and work experience as the [Plaintiff], and further assume this person retains the residual functional capacity for a limited range of light exertional work as follows: Now, this person is able to lift 20 pounds occasionally, 10 pounds frequently but must use a cane. This person is able to stand and/or walk a total of two hours in an eight-hour day, but if the person uses a cane, is able to do that increased set to four hours. The person is able to sit six hours in an eight-hour day. . . . In terms of climbing ramps and stairs, this person will occasionally climb ramps and stairs, but was to use a cane, a banister, and a stoop. This person is not able to climb ladders, scaffolds, and ropes. This person is able to occasionally balance, stoop, crouch, kneel, squat. This person is not able to crawl, not able to walk on uneven terrain, and must use a cane to walk distances longer than say across the room. This person should avoid even moderate exposure to vibration.

(AR 147-48.) The vocational expert opined that this hypothetical person could perform work as an electronics worker, a hand packer, and bench assembler, where the exertion is light and the Specific Vocational Preparation ("SVP") is two.[1] (AR 148-49.)

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[1] "SVP" stands for "Specific Vocational Preparation" and is defined as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." Dictionary of Occupational Titles, Appendix C. An SVP of 2 applies to training that is beyond a short demonstration and up to

On January 10, 2006, the ALJ issued a decision, analyzing Plaintiff's claim under the Agency's five-step sequential evaluation process. (AR 13-19.) At step one, he found that Plaintiff had not engaged in substantial gainful activity since November 20, 2002. (AR 15.) At steps two and three, he concluded that Plaintiff's right knee disorder was a severe impairment, but that it did not meet or equal a Listing. (AR 15.)

The ALJ determined at step four that Plaintiff had no past relevant work experience. (AR 17.) At step five, the ALJ found that Plaintiff could perform work as an electronics worker, bench assembler, and hand packer and, therefore, was not disabled. (AR 17-18.)

Plaintiff timely requested review of the ALJ's decision. (AR 7.) The Appeals Council denied review on March 23, 2006, and the ALJ's decision became the final decision of the Agency. (AR 4.) Plaintiff then filed a Complaint in this Court.

III.

STANDARD OF REVIEW

"Disability" under the applicable statute is defined as the inability to perform any substantial gainful activity because of "any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). The Court may overturn the ALJ's decision that a claimant is not disabled only if the decision is not supported

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and including one month of training. *Id*.

by substantial evidence or is based on legal error. *See Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

Substantial evidence "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).) It is "more than a mere scintilla but less than a preponderance," *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998), and "does not mean a large or considerable amount of evidence," *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The Court must uphold the ALJ's conclusion even if "the evidence [in the record] is susceptible to more than one rational interpretation." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Indeed, if the record evidence reasonably can support either affirming or reversing the Agency's decision, this Court must not substitute its judgment for that of the ALJ. *See Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the ALJ committed error but the error was harmless, reversal is not required. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2003)(applying the harmless error standard).

IV.

DISCUSSION

Plaintiff argues that the ALJ erred in failing to: (1) properly consider the opinion of the consultative examiner prior to finding that Plaintiff's knee impairment did not meet or equal Listing 1.02A; (2) consider the opinion of the treating physician; (3) consider lay witness testimony; and (4) develop the record. (Joint Stipulation, "JS," at 2-3.) For the following reasons, the Court finds that the

ALJ failed to properly consider whether Plaintiff's condition equals Listing 1.02A and remand is required for further consideration.

A. The ALJ's Finding That Plaintiff Did Not Meet Listing 1.02A Is Supported By The Evidence, But His Finding That Plaintiff Did Not Equal The Listing Is Not

Plaintiff contends that the ALJ's finding that his knee impairment did not meet or equal Listing 1.02A was flawed because the ALJ failed to consider the opinion of consulting orthopedic specialist Dr. Lawrence Meltzer that Plaintiff should not walk on uneven or irregular terrain. (JS at 3-5.) According to Plaintiff, the ALJ ignored this part of the doctor's opinion, and misconstrued the requirements for meeting Listing 1.02A, which "make clear" that an inability to walk on uneven or irregular terrain constitutes an inability to ambulate effectively.

It is clear from the ALJ's decision that he did consider Dr. Meltzer's opinion. The ALJ included a limitation of not walking on uneven terrain both in his hypothetical question to the vocational expert and in his ultimate determination of Plaintiff's residual functional capacity. (AR 16, 148.) In the hypothetical, the ALJ told the vocational expert to assume that the hypothetical person is "not able to walk on uneven terrain . . . ." (AR 148.) Likewise, in his decision, the ALJ concluded that Plaintiff was "unable to walk on uneven terrain." (AR 16.) Plaintiff's unsupported assertions to the contrary are rejected.

Next Plaintiff contends that the ALJ's interpretation of Listing 1.02A was erroneous. Listing 1.02A, covering major dysfunction of a joint, provides as follows:

> Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:
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> A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.02A.

> The inability to ambulate effectively is defined in § 1.00B2b as: [A]n extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. Ineffective ambulation is defined generally as having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.

20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.00B2b(1).

The regulation then provides "examples of ineffective ambulation," which "include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces. . . ." 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.00B2b(2).

At step three of the sequential evaluation process, the ALJ found:

> [Plaintiff's] impairment does not preclude his ability to ambulate effectively. While the undersigned finds the claimant does require the use of a cane to ambulate, section 1.00B2b requires the use of a hand-held assistive device that limits the function of both upper extremities. The undersigned finds the claimant is not limited in the functioning of **both** upper extremities. Accordingly, [Plaintiff's] impairment does not meet or medically equal the listed impairment in the Act.

((AR 16)(emphasis in original).)

Plaintiff first argues that the "inability to walk without the use of a walker, two crutches or two canes is **an example** of ineffective ambulation," not a conclusive requirement. (JS at 4 (emphasis in original).) Plaintiff offers no authority to support this interpretation, which is contrary to the plain language of the regulation. Furthermore, at least two courts have agreed with the ALJ's interpretation of this provision, i.e., that a claimant must require use of both arms to meet the Listing. *See Mazza v. Barnhart*, 2006 WL 4045936, at *7 (D. Kan. Oct. 25, 2006)(holding that the claimant's use of *one* cane did not meet regulatory definition of inability to ambulate effectively under Listing 1.02A); *Buckley v. Comm'r of Social Security*, 2005 WL 2318235, at *5 (E.D. Mich. Sept. 22, 2005)(noting that 1.00B2b "requires that a claimant demonstrate the need for a hand-held assistive device that requires the use of *both* hands")(emphasis in original). This Court agrees with the reasoning and the conclusion reached in these two cases. A plain

reading of the applicable sections makes clear that to fall within the ambit of the Listing a claimant must establish that he needs both arms to get around. One is not enough. The ALJ's conclusion that Plaintiff did not meet the Listing because he needed only one arm to assist in walking is supported by the law and the facts and will not be disturbed.

Plaintiff also contends that the ALJ failed to properly analyze whether Plaintiff equaled the Listing. He points out that he is unable to walk a block at a reasonable pace on rough or uneven surfaces and claims that the ALJ never addressed this fact in relation to Plaintiff meeting Listing 1.02A. Here, the Court agrees with Plaintiff.

There is no dispute that Plaintiff cannot walk on uneven terrain. (AR 16.) And there is no dispute that an inability to walk on uneven terrain falls within the definition of an inability to ambulate under § 1.00B2b. Thus, Plaintiff's argument that his condition equals Listing 1.02A because he cannot walk on uneven surfaces and uses a cane is a plausible one that should have been addressed by the ALJ. The ALJ simply failed to give any reason why Plaintiff did not equal the Listing. The only explanation the Court can glean from the ALJ's decision is that Plaintiff's condition did not equal the Listing because it did not meet the Listing. But that is not the test. On remand, the ALJ should explain why Plaintiff's inability to ambulate effectively (i.e., he can not walk a block at a reasonable pace on

rough or uneven surfaces), combined with the fact that he requires the use of one arm to walk, is not enough to equal Listing 1.02A.[2]

B. The ALJ Properly Addressed The Treating Physician's Opinion

Plaintiff complains that the ALJ failed to properly discuss the opinion of his treating physician, Dr. Niven Raval. (JS at 8-9, 12.) According to Plaintiff, the ALJ was required to discuss the factors set forth in 20 C.F.R. § 404.1527(d) ("How we weigh medical opinions") when evaluating Dr. Raval's opinion and to afford that opinion deference. (JS at 9.) For the following reasons, this claim is rejected.

It is well-established that, "[b]y rule, the Social Security Administration favors the opinion of a treating physician over non-treating physicians." *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007); *see also Aukland v. Massanari*, 257 F.3d 1033, 1037 (9th Cir. 2001); and *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). A treating physician's opinion as to the nature and severity of an impairment must be given controlling weight if the opinion is well supported and not inconsistent with other substantial evidence. SSR 96-2p; *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).

Plaintiff visited Dr. Raval, an orthopedist, five times between February 5, 2003, and September 11, 2003. (AR 119-124.) The medical records from these visits are sparse, consisting of brief notes by the doctor about Plaintiff's complaints. (AR 119-124.) The doctor also noted throughout that Plaintiff was having trouble obtaining general

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[2] Though Dr. Brodsky concluded that Plaintiff did not equal Listing 1.02A, he did not explain the basis for his opinion. (AR 103.) Nor did the ALJ cite the opinion as a basis for finding that Plaintiff did not equal the Listing. (AR 16.)

relief and needed a statement of disability from Dr. Raval to process his claim. (AR 119-124.) Each time, it seems, Dr. Raval agreed to provide Plaintiff with a note stating that Plaintiff was temporarily disabled due to his knee injury. (AR 119-124.) Plaintiff also visited Dr. Raval in January 2005, after his application for benefits was denied initially and on reconsideration. (AR 29-33, 118.) This time, too, Dr. Raval agreed to provide Plaintiff with a note stating that he was temporarily unable to work. (AR 118.)

The ALJ dismissed these temporary disability statements because he found that they were "only for the purpose of temporary disability and [were not] consistent with the medical evidence presented in the record." (AR 17.) Plaintiff complains that this was tantamount to rejecting Dr. Raval's opinion of disability and that the ALJ erred in doing so. The Court disagrees. A close look at the record demonstrates that the ALJ's finding that Plaintiff could perform light work was not inconsistent with Dr. Raval's opinion.

In his treatment notes, Dr. Raval made consistent objective findings that Plaintiff's right knee had no gross erythema, no medial joint line tenderness, and no gross joint laxity. (AR 118-25.) Dr. Raval also noted a meniscal tear in Plaintiff's right knee. (AR 118-23, 125.) At Plaintiff's request, Dr. Raval filled out a form and wrote several notes regarding Plaintiff's inability to perform his regular line of work in construction and home repair. (AR 118-20, 122, 124-25.)

The record shows that Dr. Meltzer, the orthopedic specialist, made similar findings. Dr. Meltzer found that Plaintiff's right knee was unstable, with no erythema, smooth range of joint motion, chondromalacia of the patella, and a torn medial meniscus. (AR 97-

98.) He, like Dr. Raval, opined that Plaintiff was unable to perform work in construction and home repair. (AR 98.)

Thu N. Do, a state agency physician, agreed with Dr. Meltzer's assessment. (AR 114.) State agency physician Dr. Brodsky also agreed and noted that Dr. Raval's conclusions about Plaintiff's limitation were not significantly different from his own findings, i.e., that Plaintiff could work. (AR 103, 110.)

In short, the ALJ's finding that Plaintiff could work is not inconsistent with Dr. Raval's opinion. Though Dr. Raval filled out a form certifying that Plaintiff was temporarily disabled from January through June 2005, his notes make clear that what he meant by this was that Plaintiff could not perform his regular line of work in home repair and construction. (AR 118-20, 125.) The ALJ's finding in January 2006 that Plaintiff could perform light work does not contradict Dr. Raval's opinion that Plaintiff could not perform home repair and construction work from January to June 2005. (AR 16, 118-20.)

Because the ALJ's findings were consistent with Dr. Raval's opinion, the ALJ was not required to provide reasons for rejecting it. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)(holding, where "[t]he record demonstrates that the ALJ accepted [the treating physician]'s opinion," the ALJ was not required to articulate "clear and convincing reasons" for rejecting that opinion). For this reason, there is no merit to Plaintiff's claim that the ALJ improperly rejected the treating physician's opinion.

C. The ALJ's Failure To Discuss An Agency Interviewer's Observations Was Not Error

T. Campbell, an Agency employee, interviewed Plaintiff and reported that he had difficulty walking and standing. (AR 60.) Campbell noted that Plaintiff "walks with a cane and limps." (AR 60.) The ALJ failed to address Campbell's observations. Plaintiff contends that this was error. (JS at 12-13.) The Court disagrees.

"[L]ay witness testimony as to a claimant's symptoms or how an impairment affects ability to work *is* competent evidence." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)(emphasis in original). An ALJ may reject lay testimony but must give reasons germane to a lay witness's testimony before discounting it. *Id.* at 1467. A single interview with Plaintiff, however, does not render the Agency employee a competent lay witness. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1995)(holding two-week counseling did not qualify therapist as competent lay witness); *Smith v. Barnhart*, 2002 WL 485050, at *4 (N.D. Cal. March 27, 2002)(finding that one visit by the Agency interviewer did not qualify him as a competent lay witness). Therefore, the ALJ was not required to consider Campbell's observations. *See Smith*, 2002 WL 485050, at *4 (explaining the ALJ may, but is not required to, consider an agency interviewer's testimony).

Even if the ALJ erred by failing to mention Campbell's observations, the error was harmless. The state agency physicians and the consulting orthopedic specialist made the same observations as Campbell. They recognized Plaintiff's difficulty in walking and standing, noting that Plaintiff could only stand and/or walk for a total of 2 hours in an 8-hour workday. (AR 98, 105.) The orthopedic specialist commented on Plaintiff's use of a cane and his limp. (AR

95.) Thus, any failure to note that the Agency interviewer observed the same symptoms as the doctors was not error.

D. The ALJ Properly Developed The Record

Plaintiff complains that the ALJ did not properly develop the record. He argues that the ALJ should have inquired into Plaintiff's daily activities and obtained current records from Dr. Grames, a doctor that Plaintiff testified he saw before the administrative hearing but whose records were not included in the medical record. (AR 137; JS at 15-17, 19.) Plaintiff's claim lacks merit.

An ALJ has a duty to develop the record. *See Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). This duty is heightened when the claimant is unrepresented by counsel at the hearing. As the circuit has explained, "where the claimant is not represented, it is incumbent upon the ALJ to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1992), quoting *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1991). This duty, however, is triggered only when the evidence is ambiguous, or when the ALJ finds the record inadequate to allow for proper evaluation of the evidence. *See Smolen*, 80 F.3d at 1288; *see also Armstrong v. Commissioner of Soc. Sec. Admin.*, 160 F.3d 587, 590 (9th Cir. 1998). The ALJ may discharge this duty in several ways, including subpoenaing the claimant's physicians, submitting questions to the claimant's physicians, continuing the hearing, or keeping the record open after the hearing to allow supplementation of the record. *See Tidwell*, 161 F.3d at 602; *see also Smolen*, 80 F.3d at 1288. Even if the ALJ's development of the record was inadequate, however, a claimant is not entitled to relief unless he can show prejudice. *See Vidal v. Harris*, 637 F.2d 710, 713 (9th Cir. 1981).

Plaintiff claims that the ALJ had a duty to ask him about his daily activities. (JS at 15.) It is not clear that such a duty existed because there appears to be nothing about these activities that was not clear in the record. *See Smolen*, 80 F.3d at 1288. Even assuming that the ALJ had a duty to probe further, however, Plaintiff simply does not provide this Court with any explanation about what the ALJ should have asked about and what that might have shown. Absent this explanation, Plaintiff cannot establish prejudice, which he is required to do. *See Vidal*, 637 F.2d at 713; *see also Hall v. Secretary of Health, Educ. & Welfare*, 602 F.2d 1372, 1378 (9th Cir. 1979)(holding prejudice "is not demonstrated by merely speculative eventualities."). Moreover, assuming arguendo, that the ALJ had a duty to inquire further, this duty was discharged when he gave Plaintiff an opportunity to bring up information about his daily activities at the hearing. *See Hart v. Sullivan*, 824 F. Supp. 903, 907 (N.D. Cal. 1992)(finding ALJ met duty to develop record by giving claimant "fair opportunity to bring forward any relevant evidence at the hearing").

Plaintiff also contends that the ALJ erred by making his decision without obtaining current records from Plaintiff's doctors. (JS 15, 19.) During the hearing, the ALJ told Plaintiff that he would keep the record open for Plaintiff to submit additional records. (AR 151.) This was all the ALJ was required to do. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)(holding, where ALJ has duty to develop record, duty may be discharged in several ways, including "keeping the record open after the hearing to allow supplementation of the record"). Plaintiff cannot now blame the ALJ because Plaintiff failed to submit additional records. Further, Plaintiff does not

explain how the omission of the records prejudiced him, which is his burden. *Vidal*, 637 F.2d at 713.

For these reasons, the Court concludes that the ALJ did not err when he failed to inquire about Plaintiff's daily activities and failed to obtain Dr. Grames's records.

V.

CONCLUSION

For the reasons set forth above, the Agency's decision is reversed and the case is remanded for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

DATED: October 24, 2007.

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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